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Issue Date: 25 April 2006

CASE NOS.: 2005-BLA-05247
2005-BLA-05622

In the Matter of

BOBBIE N. HARRISON o/b/o and
Widow of COY D. HARRISON
Claimant

v.

DRUMMOND COMPANY, INC.
Self-insured Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-interest

Appearances:

PATRICK K. NAKAMURA, Esq.
For Claimant

KATIE LOGGINS VREELAND, Esq.
For Employer

Before:

JANICE K. BULLARD
Administrative Law Judge

DECISION AND ORDER

This proceeding arises from two separate claims for benefits under the federal Black Lung Act, 30 U.S.C. §§ 901-945 ("the Act") and the regulations issued thereunder, which are found in Title 20 of the Code of Federal Regulations. Regulations referred to herein are contained in that Title. [1]

[1] The Department of Labor ("DOL") has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at C.F.R. Parts 718, 722, 725, and 726 (2002). They are applicable to all claims pending, on, or filed after that date. See 20 C.F.R. § 718.101(b)(2001); 20 C.F.R. § 725.2(c)(2001). The United States Court of Appeals for the District of Columbia has upheld the validity of the revised regulations. See National Mining Assoc. v. Department of Labor, 292 F.3d 849 (D.C. Cir. 2002).

Benefits under the Act are awarded to coal miners who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of coal miners whose death was due to pneumoconiosis. Pneumoconiosis, commonly known as Black Lung, is a dust disease of the lungs resulting from coal dust inhalation.

On September 30, 2004, the two instant claims were consolidated for one hearing. The consolidated case was subsequently assigned to me. This Decision and Order therefore addresses both a claim brought on behalf of a deceased miner ("miner's claim"), and a claim brought on behalf of the deceased miner's surviving spouse ("survivor's claim").

I. ISSUES

A. MINER'S CLAIM

(1) Whether Claimant has established a material change of conditions on behalf of the Miner, pursuant to 20 C.F.R. § 725.310.

(2) Whether the Miner had pneumoconiosis pursuant to 20 C.F.R. § 718.202.

(3) Whether the Miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. § 718.203.

(4) Whether the Miner was totally disabled pursuant to 20 C.F.R. § 718.204(b).

(5) Whether the Miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. § 718.204(c).

B. SURVIVOR'S CLAIM

(6) Whether the Miner's death was due to pneumoconiosis, pursuant to 20 C.F.R. § 718.205.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. PROCEDURAL BACKGROUND

1. Miner's Claim: Case No. 2005-BLA-05247

Coy D. Harrison ("the Miner") originally filed a claim for federal Black Lung benefits with the U.S. Department of Labor's Office of Workers' Compensation Programs ("OWCP") on July 22, 1986. MDX-1. That claim was denied by the OWCP's Claims Examiner on October 20, 1986. Id. The Miner appealed the decision and by Memorandum of Conference dated March 19, 1987, the OWCP's Deputy Commissioner also denied benefits. Id. On March 30, 1987, the District Director, OWCP ("Director"), affirmed that denial. Id.

On December 30, 2002, the Miner filed a second claim for Black Lung benefits. MDX-3. On November 1, 2003, the Miner passed away. MDX-26. By Proposed Decision and Order dated December 15, 2003, the Director denied the Miner's claim for benefits. MDX-25. The Director found that Drummond Company, Inc. ("Employer"), was the responsible operator and that the Miner established 36 years and 5 months of coal mine employment. Id. However, benefits were denied because the Director found that the Miner failed to establish any of the four elements of entitlement. Id. On December 24, 2003, the Miner's surviving spouse, Bobbie Harrison ("Claimant"), filed a request for revision of the Director's Order on behalf of her deceased husband. MDX-26. By Revised Proposed Decision and Order dated March 9, 2004, the Director again denied the claim and notified Claimant that he could not accept new evidence in a request for revision. MDX-27. On April 16, 2004, Claimant petitioned the Director for modification of the denial of benefits. MDX-28. By Proposed Decision and Order dated August 24, 2004, the Director denied Claimant's petition for modification. MDX-30. Although the Director found that Claimant's new evidence established that the Miner had pneumoconiosis and that the pneumoconiosis presumably arose out of coal mine employment, benefits were denied because the Director found that Claimant failed to establish that the Miner was totally disabled due to pneumoconiosis. Id. On September 22, 2004, Claimant filed a request for a formal hearing before the Office of Administrative Law Judges ("OALJ"). MDX-31. On November 19, 2004, the miner's claim was referred to the OALJ. MDX-33.

2. Survivor's Claim: Case No. 2005-BLA-05622

Subsequent to the Miner's passing, Claimant filed a survivor's claim for Black Lung benefits on her own behalf on December 29, 2003. SDX-2. By Proposed Decision and Order dated December 15, 2004, the Director awarded the Claimant benefits under the Act. SDX-18. On January 10, 2005, Employer filed a request for a formal hearing before the OALJ. SDX-19. On February 28, 2005, the survivor's claim was referred to the OALJ. SDX-23.

3. Consolidation of the Claims

By Motion filed January 25, 2005, counsel for Claimant requested that the miner's claim and the survivor's claim be consolidated for one hearing. By Order issued February 1, 2005, Administrative Law Judge ("ALJ") Jeffrey Turek Ordered the consolidation of the two claims. The case was then reassigned to ALJ Robert D. Kaplan. After a continuance for good cause, the case was subsequently reassigned to me. By Notice of Hearing issued June 1, 2005, I scheduled a formal hearing on the matter for October 25, 2005 in Birmingham, Alabama. At the hearing, [2] Director's exhibits 1 through 36 in the miner's claim[3] and Director's exhibits 1 through 25 in the survivor's claim[4] were admitted into the record. Claimant's testimony was also taken. By Order issued February 17, 2006, I closed the record and set March 20, 2006 as the deadline for submission of post-hearing briefs. Employer filed a post-hearing brief[5] on March 20, 2006. Claimant filed her post-hearing brief[6] on March 23, 2003. The following decision is based upon

[2] "Tr. at -" denotes the hearing transcript of the October 25, 2005 formal hearing.
[3] Cited as "MDX-1" through "MDX-36."
[4] Cited as "SDX-1" through "SDX-25."
[5] Cited as "EB at -."
[6] Cited as "CB at -."

a review of the evidentiary record, the arguments of the parties and an analysis of the applicable law.

B. FACTUAL BACKGROUND

1. Claimant's Testimony [Tr. at 12-26]

Claimant testified that she married the Miner in 1948. Claimant stated that her husband had worked underground for most of his coal mine employment. The Miner retired in 1986 because of breathing problems and arthritis. He was 56 or 57 years old at the time. He began having breathing problems approximately five to six years before he retired. Those breathing problems progressively worsened as he grew older. At one point, the Miner wore a respirator consistently for two years. After he retired, the Miner was no longer able to fish or hunt, two hobbies he enjoyed, because he was not able to "breathe enough to walk." The Miner also began experiencing heart problems nine months before he passed. The Miner eventually died in the hospital. He was taken to the hospital because he was gasping for breath and had trouble sleeping. On cross-examination, Claimant testified that the Miner had trouble crawling through the mines because of his arthritis. At around 1986, the Miner had to have surgery for some nerve problems in his arm.

C. ENTITLEMENT

Benefits are provided under the federal Black Lung Act for or on behalf of miners who are totally disabled due to pneumoconiosis, or who were totally disabled due to pneumoconiosis at the time of death. 20 C.F.R. § 718.204(a). "Pneumoconiosis" is defined as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 20 C.F.R. § 718.201(a). Because both claims under consideration were filed subsequent to January 19, 2001, Claimant's entitlement to benefits would normally be evaluated under the revised regulations set forth at 20 C.F.R. Part 718. Generally, in order to establish entitlement to benefits under Part 718, a claimant bears the burden of establishing the following elements by a preponderance of the evidence: (1) the miner has pneumoconiosis, (2) the pneumoconiosis arose out of coal mine employment, (3) the miner is totally disabled, and (4) the miner's pneumoconiosis contributes to his total disability. 20 C.F.R. § 725.202(d)(2)(i)-(iv); See Director, OWCP v. Greenwich Colliers, 512 U.S. 267 (1994); Perry v. Director, OWCP, 9 B.L.R. 1-1, 1-2 (BRB 1986).

1. The Miner's Modification Claim

The claim on behalf of the deceased Miner is before me as an appeal of the Director's Proposed Decision and Order Denying Request for Modification dated August 24, 2004. MDX-30. The claim at bar was originally denied by the Director because he found that Claimant had failed to establish any of the four elements of entitlement. See MDX-25. Within a year of that denial, Claimant submitted the Miner's death certificate and autopsy report as new medical evidence in support of a petition for modification. MDX-28. On consideration of modification, the Director found that the new evidence established the presence and etiology elements of

entitlement but denied benefits because Claimant had failed to establish total disability due to pneumoconiosis. MDX-30.

An award in a Black Lung claim may be modified upon demonstrating either that (1) a "change in conditions" has occurred, or (2) there was a "mistake in determination of fact." 20 C.F.R. § 725.310. The claimant has the burden of proof in proceedings in which she has requested modification of a previous denial. Metropolitan Stevedore Co. v. Rambo, 521 U.S. 121 (1997). The Eleventh Circuit Court of Appeals has defined the phrase "change in conditions" as a change in the claimant's physical condition. See Director, OWCP v. Drummond Coal Co., 831 F.2d 240 (11th Cir. 1987); see also Lukman v. Director, OWCP, 11 B.L.R. 1-71 (1988) (Lukman II). In determining whether a "change in conditions" is established, the fact-finder must conduct an independent assessment of the newly submitted evidence and consider it in conjunction with the previously submitted evidence to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. Kingery v. Hunt Branch Coal Co., 19 B.L.R. 1-6 (1994); Napier v. Director, OWCP, 17 B.L.R. 1-111 (1993); Nataloni v. Director, OWCP, 17 B.L.R. 1-82 (1993). In addition, regardless of whether the parties have submitted new evidence, the ALJ should consider whether the evidence of record demonstrates a mistake in a determination of fact. 20 C.F.R. § 725.310(c); O'Keefe v. Aerojet-General Shipyards, Inc., 404 U.S. 254, 257 (1971). If the ALJ finds the evidence sufficient to establish modification pursuant to 20 C.F.R. § 725.310, she must consider entitlement pursuant to 20 C.F.R. Part 718. Kingery, *supra*.

Because the Director originally found that the Miner had not established any of the elements of entitlement, in order for Claimant to successfully establish a "change of conditions" pursuant to 20 C.F.R. § 725.310, she must establish any one of the four elements of entitlement.

a) Whether the Miner Had Pneumoconiosis

A finding of the existence of pneumoconiosis is determined pursuant to 20 C.F.R. § 718.202. In addition, the regulations permit an ALJ to give appropriate consideration to "the results of any medically acceptable test or procedure reported by a physician and not addressed in this subpart, which tends to demonstrate the presence or absence of pneumoconiosis." 20 C.F.R. § 718.107(a). Finally, the Benefits Review Board ("the Board") has held that all evidence relevant to the existence of pneumoconiosis must be considered and weighed. Mabe v. Bishop Coal Co., 9 B.L.R. 1-67 (1986) (the Board upheld a finding that the claimant had not established the existence of pneumoconiosis even where the X-ray evidence of record was positive).

Medical Evidence

There are four means of establishing the existence of pneumoconiosis set forth at §§ 718.202(a)(1) through (a)(4):

(1) X-ray evidence: § 718.202(a)(1).

(2) Biopsy or autopsy evidence: § 718.202(a)(2).

(3) Regulatory presumptions: § 718.202(a)(3):

(a) § 718.304 - Irrebutable presumption of total disability due to pneumoconiosis if there is evidence of complicated pneumoconiosis.

(b) § 718.305 - Where the claim was filed before January 1, 1982, there is a rebuttable presumption of total disability due to pneumoconiosis if the miner has proven fifteen (15) years of coal mine employment and there is other evidence demonstrating the existence of totally disabling respiratory or pulmonary impairment.

(c) § 718.306 - Rebuttable presumption of entitlement applicable to cases where the miner died on or before March 1, 1978 and was employed in one or more coal mines prior to June 30, 1971.

and

(4) Physician's opinions based upon objective medical evidence: § 718.202(a)(4).

The following is a discussion of the § 718.202(a) evidence of record:

(1) 20 C.F.R. § 718.202(a)(1): Chest X-Ray Evidence. In his Proposed Decision and Order denying benefits, the Director considered the following X-ray evidence in finding that Claimant had not established that the Miner suffered from pneumoconiosis:

Date of X-Ray	Date Read	Exhibit No.	Physician	Radiological Credentials[7]	Film Quality	Interpretation
2/14/03	2/26/03	MDX-9	Ballard	B-Reader	1	0/1
2/14/03	4/14/03	MDX-9	Barrett	B-Reader; BCR	2	Quality only
8/21/86	8/21/86	MDX-1	Hasson	B-Reader	1	Negative
2/11/86	9/18/86	MDX-1	Cole	B-Reader; BCR	1	Negative
1/21/87	3/09/87	MDX-1	Elmer	B-Reader; BCR	2	Negative

As is evident from the preceding table, the old X-ray evidence of record is overwhelming negative for pneumoconiosis. I note that there is a February 9, 1987 X-ray reading by Dr. Ballard that interprets an X-ray film from January 21, 1987 as Category 1/0 positive for pneumoconiosis. However, that same film was read by Dr. Elmer as negative. As they are both

[7] A B-reader ("B") is a physician who has demonstrated a proficiency in assessing and classifying X-ray evidence of pneumoconiosis by successful completion of an examination conducted by the United States Public Health Service. 42 C.F.R. § 37.51 A physician who is a Board-certified radiologist ("BCR") has received certification in radiology of diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. 20 C.F.R. § 727.206(b)(2)(iii) (2001).

dually qualified physicians, I find that that X-ray is in equipoise and does not sustain a finding of pneumoconiosis.

The newly developed X-ray evidence does not demonstrate the presence of pneumoconiosis. Considering all of the X-ray evidence together, I find that it does not sustain a finding of pneumoconiosis.

(2) 20 C.F.R. § 718.202(a)(2): Autopsy Evidence. After the Director's denial of benefits, Claimant submitted the Miner's death certificate and autopsy report. MDX-26. The death certificate, signed by Dr. James M. Adams, listed "pulmonary anthracosis" as a significant condition contributing to death. MDX-26. The autopsy report, signed electronically by Dr. James L. Newsome, explained that the Miner's pulmonary anthracosis is "consistent with a simple coal worker's pneumoconiosis, Type I (Type I, black lung disease)."

The definition of "clinical pneumoconiosis" includes anthracosis. 20 C.F.R. § 718.201(a)(1). Further, the Eleventh Circuit Court of Appeals has held that a diagnosis of pulmonary anthracosis is the equivalent of a diagnosis of pneumoconiosis. Dagnan v. Black Diamond Coal Mining Co., 994 F.2d 1536 (11th Cir. 1993); see also Bueno v. Director, OWCP, 7 B.L.R. 1-337 (1984). An autopsy report shall be accepted unless there is evidence that the report is not accurate or that the claim has been fraudulently represented. 20 C.F.R. § 718.202(a)(2). The record does not contain evidence of fraud or inaccuracy of the autopsy report. Accordingly, I find that the 20 C.F.R. § 718.202(a)(2) evidence of record sustains a finding of the presence of pneumoconiosis.

(3) 20 C.F.R. § 718.202(a)(3): Regulatory Presumptions. After review of the record, I find that the regulatory presumptions found at 20 C.F.R. §§ 718.304, 718.305, and 718.306 do not apply to the facts of this case.

(4) 20 C.F.R. § 718.202(a)(4): Physician's Opinions. The fourth way to establish the existence of pneumoconiosis under § 718.202 is set forth as follows in subparagraph (a)(4):

> A determination of the existence of pneumoconiosis may also be made if a physician exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

Section 718.204(a) defines pneumoconiosis as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment" and "includes both medical, or 'clinical', pneumoconiosis and statutory, or 'legal', pneumoconiosis."

The record contains the following physicians' opinion evidence:

Report of Dr. Jack H. Hasson (MDX-19). Dr. Jack Hasson is a board-certified pulmonary specialist. By report dated August 21, 1986, Dr. Hasson diagnosed the Miner as following: 1) no evidence of pneumoconiosis [based on radiography]; 2) HCUD; and 3) chronic bronchitis. Dr. Hasson opined that these diagnosed conditions were not related to dust exposure in the Miner's coal mine employment. That is significant because the Board has held that chronic bronchitis falls within the definition of pneumoconiosis if it is related to the miner's coal mine employment. Hughes v. Clinchfield Coal Co., 21 B.L.R. 1-134, 1-139 (1999). Because Dr. Hasson did not find that the Miner's conditions were due to coal dust inhalation, I find that his opinion does not sustain a finding of either clinical or legal pneumoconiosis. No contemporaneous contradictory opinion is of record.

Report of Dr. Jeffrey Hawkins (MDX-9). By report dated March 13, 2003, Dr. Hawkins diagnosed the Miner with the following cardiopulmonary conditions: 1) chronic asthmatic bronchitis and 2) cardiac pacemaker/unknown ventricular dysfunction. Atopic reactive airway disease was listed as the etiology of these cardiopulmonary conditions. Dr. Hawkins did not opine that these conditions were related to the inhalation of coal dust. Further, after review of the Miner's chest X-ray of February 14, 2002, Dr. Hawkins noted that there were "minimal parenchymal changes; insufficient for pneumoconiosis." As such, I find that Dr. Hawkins' report does not sustain a finding of clinical or legal pneumoconiosis.

Report of Dr. P. Raphael Caffrey (SDX-9). Dr. Raphael Caffrey is a board-certified pathologist. He offered a consultative report, based upon a review of a number of the Miner's medical records, dated June 18, 2004. In his report, Dr. Caffrey noted that he had the opportunity to review slides of the Miner's lung tissue taken from the autopsy. After review of those slides, Dr. Caffrey diagnosed simple coal workers' pneumoconiosis involving the left lung. He was of the opinion that the degree of simple coal workers' pneumoconiosis was "very mild." I find that Dr. Caffrey's report sustains a finding of pneumoconiosis.

Report of Dr. A. David Russakoff (SDX-10). Dr. David Russakoff is a board-certified pulmonary specialist and a B-Reader. Dr. Russakoff's report, dated September 27, 2004, disclosed that he had the opportunity to review a number of the Miner's medical records. Included among these were the six autopsy slides of the Miner's lung tissue submitted from the autopsy. Dr. Russakoff's review of those slides found minimal evidence of pathologic coal workers' pneumoconiosis. He noted that the degree of its presence is so minimal as to not be visible to the naked eye on chest X-ray evaluation. He considers this so minimal as to be clinically and functionally insignificant. Despite the reported minimal presence, I find that Dr. Russakoff's report supports a finding of pneumoconiosis.

Report of Dr. Gregory J. Fino (SDX-11). Dr. Gregory Fino is a board-certified pulmonary specialist. He offered a consultative report dated October 1, 2004. In the report, he opined that simple coal workers' pneumoconiosis was present.

The medical opinion evidence on the whole demonstrates that the Miner had pneumoconiosis.

Weighing the Medical Evidence

Although the chest X-ray evidence of record does not sustain a finding of pneumoconiosis, I find that the other medical evidence as a whole does. The autopsy report, to which I accord significant probative weight, clearly supports a finding of clinical pneumoconiosis. Dr. Newsome was unequivocal in diagnosing pulmonary anthracosis consistent with coal workers' pneumoconiosis. That diagnosis is supported by the consultative reports of Drs. Caffrey, Russakoff, and Fino. Although those three physicians only found a mild degree of simple coal workers' pneumoconiosis, that is sufficient to support the autopsy report. Because autopsy evidence is the most reliable evidence of the existence of pneumoconiosis, I find that Claimant has established that the Miner had pneumoconiosis. See Terlip v. Director, OWCP, 8 B.L.R. 1-363 (1985).

Because Claimant has established an element of entitlement that was previously denied, I find that Claimant has established modification pursuant to 20 C.F.R. § 718.310.

b) "Change in Conditions" versus "Mistake of Fact"

I find that Claimant's modification is based upon a "change in conditions" as opposed to a "mistake in determination of fact." See 20 C.F.R. § 725.310(c). As I found, the X-ray evidence failed to sustain a finding of the presence of pneumoconiosis. The Director's original denial of benefits was based specifically on this same determination of fact. The Director did not have the opportunity to consider the 20 C.F.R. § 718.202(a)(2) autopsy evidence prior to his original denial. As such, I find that there was no mistake in determination of fact. The most recent X-ray reading was performed by Dr. Ballard on February 26, 2003. Dr. Ballard read the X-ray as Category 0/1 negative for pneumoconiosis. MDX-9. Although a Category 0/1 interpretation will not support a finding of pneumoconiosis under the Act or regulations, it *does* demonstrate a presence of opacities on the lungs. The Miner's autopsy, which sustained a finding of pneumoconiosis, was performed approximately eight months after Dr. Ballard's X-ray reading. It is quite plausible that the number of opacities on the Miner's lungs increased over those eight months because pneumoconiosis is a progressive and irreversible disease. See Clark v. Karst-Robbins Coal Co., 12 B.L.R. 1-149 (1989) (en banc); Casella v. Kaiser Steel Corp., 9 B.L.R. 1-131 (1986). The evidence of record is therefore consistent with a "change in conditions."

Because Claimant has established modification based upon establishment of the presence of pneumoconiosis, I now address the other three elements of entitlement pursuant to Part 718 of the regulations.

c) Whether the Pneumoconiosis Arose Out of Coal Mine Employment

The Regulations mandate that in order for a claimant to succeed on a claim for benefits under the Act, "it must be determined that the miner's pneumoconiosis arose at least in part out of coal mine employment." 20 C.F.R. § 718.203(a). There is a rebuttable presumption that the pneumoconiosis arose out of coal mine employment if a miner who is or was suffering from

pneumoconiosis was employed for ten years or more in one or more coal mines. 20 C.F.R. § 718.203(b); §718.302.

Employer concedes that the Miner was employed in coal mine work for at least 36 years. See EB at 11 ("Because [the Miner] was employed in the coal mines for approximately 36 years, [Employer] also acknowledges that the presumption at 20 C.F.R. § 718.203(b) has been met). I find that Employer's concession of 36 years of coal mine employment is supported by the record. Therefore, the statutory presumption has been triggered. In the absence of evidence rebutting that presumption, I find that Claimant has established that the Miner's pneumoconiosis arose out of coal mine employment.

d) Whether the Miner was Totally Disabled

In addition to establishing the presence of coal workers' pneumoconiosis, Claimant must establish that the Miner was totally disabled due to a respiratory or pulmonary condition. 20 C.F.R. § 718.204(a). A miner is considered totally disabled within the Act if "the miner has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner:

> (i) From performing his or her usual coal mine work; and
> (ii) From engaging in gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time."

20 C.F.R. § 718.204(b)(1). The regulations at Section 718.204 provide the following five methods to establish total disability: (i) pulmonary function studies; (ii) arterial blood gas studies; (iii) evidence of cor pulmonale with right-sided congestive heart failure; (iv) reasoned medical opinions; and (v) lay testimony under certain circumstances. 20 C.F.R. §§ 718.204(b)(2) and (d). However, in a living miner's claim, a finding of total disability due to pneumoconiosis shall not be made solely on the miner's statements or testimony. 20 C.F.R. § 718.204(d)(5); Tedesco v. Director, OWCP, 18 B.L.R. 1-103 (1994). Further, a presumption of total disability is not established by a showing of evidence qualifying under a subsection of § 718.204(b)(2), but rather such evidence shall establish total disability in the absence of contrary evidence of greater weight. Gee v. W.G. Moore & Sons, 9 B.L.R. 1-4 (1986). All medical evidence relevant to the question of total disability must be weighed, like and unlike together, with Claimant bearing the burden of establishing total disability by a preponderance of the evidence. Rafferty v. Jones & Laughlin Steel Corp., 9 B.L.R. 1-231 (1987).

i) Pulmonary Function Studies

In order to demonstrate total respiratory disability on the basis of pulmonary function study evidence, a claimant may provide studies, which, after accounting for sex, age, and height, produce a qualifying value for the FEV1 test, and produce either a qualifying value for the FVC test or the MVV test, or produce a value of FEV1 divided by the FVC less than or equal to 55 percent. "Qualifying values" for the FEV1, FVC and the MVV tests are measured results less than or equal to values listed in the appropriate tables of Appendix B to 20 C.F.R. Part 718, 20

C.F.R. § 718.204(b)(2)(i). Director, OWCP v. Simiec, 894 F.2d 635, 637 n.5, 13 B.L.R. 2-259 (3rd. Cir 1990).

The record contains the following pulmonary function studies ("PFSs") summarized below:

Date	EX. No.	Physician	Age/ Ht.	FEV_1	FVC	MVV	FEV_1/FVC	Effort	Qualifies
2/14/03	MDX -9	Hawkins	72 70"	2.41	3.86	85	62%	Good	**NO** FEV_1: 1.88
8/21/86	MDX -1	Hasson	57 70.5	3.11	4.25	54	73%	Poor	**NO** FEV_1: 2.14

As the preceding table demonstrates, neither of the PFSs of record reflect qualifying values under the regulations. Therefore Claimant cannot demonstrate total disability with pulmonary function study evidence.

ii) Arterial Blood Gas Studies

To establish total disability based on Arterial Blood Gas Studies, the test must produce the totals presented in the Appendix C to 20 C.F.R. Part 718, 20 C.F.R. § 718.204(b)(2)(ii).

The record contains the following arterial blood gas studies ("ABGs") summarized below:

Date	EX. No.	Physician	Altitude	pCO_2	pO_2	Qualifies[8]
2/14/03	MDX-9	Hawkins	0-2999 ft.	31 27*	91 99*	**NO** (69) (73)*
8/21/86	MDX-1	Hasson	0-2999 ft.	29.2 28.8*	101.8 113.9	**NO** (71)

* Measured at the end of or during exercise

As the preceding table demonstrates, neither of the ABGs of record reflect qualifying values under the regulations, and Claimant cannot demonstrate total disability with arterial blood gas study evidence.

iii) Cor Pulmonale Diagnosis

A miner may demonstrate total disability with, in addition to pneumoconiosis, medical evidence of cor pulmonale with right-sided heart failure. 20 C.F.R. § 718.204(b)(2)(iii).

[8] In order to qualify for total disability under arterial blood gas studies, Claimant's pCO_2 value would have to be equal to or lower than the given pO_2 levels found in the "Qualifies" column of this chart.

There is no evidence of cor pulmonale with right-sided congestive heart failure in the record. Accordingly, I find that Claimant has not demonstrated total disability pursuant to § 718.204(b)(2)(iii).

iv) Reasoned Medical Opinion

The fourth method for determining total disability is through the reasoned medical judgment of a physician that Claimant's respiratory or pulmonary condition prevents him from engaging in his usual coal mine work or comparable and gainful employment. Such an opinion must be based on acceptable clinical and laboratory diagnostic techniques. 20 C.F.R. § 718.204(b)(2)(iv). A reasoned opinion is one that contains underlying documentation adequate to support the physician's conclusions. Field v. Island Creek Coal Co., 10 BLR 1-19, 1-22 (BRB 1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts and other data on which he bases his diagnosis. Id. An unreasoned or undocumented opinion may be given little or no weight. Clark v. Karst-Robbins Coal Co., 12 BLR 1-149, 1-155 (BRB 1989).

Report of Dr. Jeffrey Hawkins (MDX-9). Dr. Hawkins performed a pulmonary evaluation of the Miner on February 14, 2003. Based upon the vent study he performed, Dr. Hawkins concluded that the Miner suffered from a mild obstructive lung defect. He diagnosed the Miner with (1) chronic asthmatic bronchitis and (2) cardiac pacemaker/ unknown ventricular dysfunction. Dr. Hawkins opined that because of this impairment, the Miner was "unable to perform manual labor; should avoid exposure to chemicals, dusts, [and] fumes."

Report of Dr. Gregory Fino (SDX-11). Dr. Gregory Fino is a board-certified pulmonary specialist and a B-Reader. He authored a consultative report dated October 1, 2004, in which he summarized his review of the Miner's medical records. Based upon his review of the records, Dr. Fino opined that "from a respiratory standpoint, this man was neither partially nor totally disabled from returning to his last mining job or a job requiring similar effort."

I find that the report of Dr. Jeffrey Hawkins at MDX-9 establishes that the Miner was totally disabled pursuant to 20 C.F.R. § 718.204(b)(2)(iv). Dr. Hawkins opined that the Miner suffered from a moderate respiratory impairment and, as a result, was unable to perform manual labor and should avoid exposure to dust and fumes. His opinion was based upon a pulmonary evaluation that he performed for the DOL. That evaluation included objective clinical testing which Dr. Hawkins adequately documented in his report. Because Dr. Hawkins' opinion was based on adequately documented testing and observations, particularly the results of a pulmonary function study he administered, I find that his opinion is well-reasoned and warrants significant probative weight.

Dr. Hawkins' opinion is contradicted by that of Dr. Fino. Dr. Hawkins was an examining physician of the Miner, while Dr. Fino was only a consultative physician, and therefore, Dr. Hawkins' opinion would be entitled to some additional weight. In his report, Dr. Fino did not address the pulmonary function study administered by Dr. Hawkins on February 14, 2003, which was the basis of Dr. Hawkins's opinion. I find this omission compromises the reliability of Dr. Fino's opinion. I find that Dr. Fino's opinion warrants less probative weight on the issue of total

disability. Since Dr. Hawkins found that the Miner was unable to perform manual labor because of a respiratory impairment,[9] I find that his report establishes that the Miner was unable to perform coal mine work.

v) Lay Testimony

At the formal hearing, the Miner's wife testified that the Miner suffered from breathing problems that became progressively worse as he grew older. Those breathing problems made it difficult for the Miner to walk and to sleep.

vi) Weighing of the Total Disability Evidence

The record does not demonstrate total disability under §§ 718.204(b)(2)(i), (ii), or (iii). The physician opinion evidence does establish total disability pursuant to 20 C.F.R. § 718.204(b)(2)(iv). I accord great weight to the opinion evidence and find that it establishes that the Miner was totally disabled under the Act.

e) Whether Pneumoconiosis Contributes to Total Disability

The amended regulations at Part 725 mandate that a miner is eligible for benefits if his "pneumoconiosis contributes to [his] total disability." 20 C.F.R. § 725.202(d)(2)(iv). "Total disability due to pneumoconiosis"[10] is defined at 20 C.F.R. § 718.204(c) as follows:

> (1) A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis…is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> > (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
> > (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. § 718.204(c)(1)(i) and (ii); See also Lollar v. Alabama By-Products Corp., 893 F.2d 1258 (11th Cir. 1990) (the "due to pneumoconiosis" requirement demands evidence that

[9] I reject Employer's argument that Dr. Hawkins did not conclude that a respiratory or pulmonary condition *standing alone* prevented Claimant from performing his last coal mine work. EB at 13. Although I agree with Employer's assertion that Dr. Hawkins diagnosed the Miner with a variety of medical conditions, both cardiopulmonary and non-cardiopulmonary in nature, I read his report as asserting that the Miner would have been unable to perform manual labor because of either type of medical condition, independently, and not necessarily because of the combination of medical conditions. I find this way because Dr. Hawkins wrote, "unable to perform manual labor," twice under both the cardiopulmonary diagnosis section and the non-cardiopulmonary diagnosis section of his DOL Form CM-988. These sections are clearly marked independent of each other and do not implicate the opinions or findings expressed in the other section.

[10] I note that although there exists an ambiguity in the language of the analysis, 20 C.F.R. § 725.202(d)(2)(iv) cross-references 20 C.F.R. § 718.204(c).

"pneumoconiosis was a substantial contributing factor in the causation of the [miner's] total pulmonary disability"). The cause or causes of a miner's total disability shall be established by means of a physician's documented and reasoned medical report. 20 C.F.R. § 718.204(c)(2).

Claimant asserts that the report of Dr. Hawkins, the autopsy report of Dr. Newsome and the treatment notes of Dr. Adams establish the fourth element of entitlement. CB at 10-11. I disagree and find that none of those reports establish that the Miner's pneumoconiosis was a substantial contributing factor in the causation of the Miner's total disability. First, although they are sufficient to establish the presence of pneumoconiosis at the time of the Miner's death, neither the death certificate nor the autopsy report address whether the Miner was totally disabled during his lifetime. Disability is defined under the Act in terms of being unable to return to coal mine employment.

In direct contrast to Claimant's assertions, Dr. Hawkins' report makes it clear that the Miner's total disability was due to health conditions other than pneumoconiosis. Although Dr. Hawkins found that the Miner suffered from a moderate obstructive lung defect, he did not diagnose the Miner with pneumoconiosis. In fact, he made the contrary finding. In his report, Dr. Hawkins wrote that a review of the Miner's February 14, 200[3] chest X-ray revealed "minimal parenchymal changes insufficient for diagnosis of pneumoconiosis." Rather than diagnose pneumoconiosis, Dr. Hawkins diagnosed the Miner with chronic asthmatic bronchitis which he attributed to atopic reactive airway disease. Dr. Hawkins did not relate the chronic bronchitis to coal mine employment. Thus, Dr. Hawkins found neither clinical nor legal pneumoconiosis. Since Dr. Hawkins' report expressly excludes pneumoconiosis as a diagnosis, it is clearly evident that Dr. Hawkins was of the opinion that the Miner's disability was due to those conditions unrelated to pneumoconiosis. Consequently, it is only logical that Dr. Hawkins could not be of the opinion that coal workers' pneumoconiosis was a "substantially contributing cause" of the Miner's total disability.

Dr. Hawkins' opinion is corroborated by that of Dr. Caffrey. Although Dr. Caffrey did diagnose the Miner with "very mild" coal workers' pneumoconiosis, he was of the opinion that the pneumoconiosis "did not cause [the Miner] any pulmonary disability because of the paucity of the disease." Dr. Caffrey noted on more than one occasion that the degree of the Miner's pneumoconiosis could not cause pulmonary disability. Like Dr. Hawkins' opinion, Dr. Caffrey's is adequately documented and well-reasoned. He lists the records he reviewed and gives a narrative explanation and rationale for his opinion.

Because Claimant has not submitted evidence that demonstrates a nexus between the Miner's total disability and his pneumoconiosis, I find that she has failed to establish the fourth element of entitlement. Accordingly, her claim on behalf of the Miner for benefits must be denied.

2. The Survivor's Claim

The Act provides Black Lung benefits to eligible survivors of deceased miners whose death was due to pneumoconiosis. 20 C.F.R. § 718.205(a). Eligible survivors may include the miner's widowed spouse. 20 C.F.R. § 725.201(a)(2). In order to establish entitlement to

benefits in a survivor's claim filed on or after January 1, 1982, a claimant must establish three elements by a preponderance of the evidence: (1) that the miner had pneumoconiosis; [11] (2) that the miner's pneumoconiosis arose out of coal mine employment; and (3) that the miner's death was due to pneumoconiosis. 20 C.F.R. § 718.205(a)(1)-(3); Trumbo v. Reading Anthracite Co., 17 B.L.R. 1-85 (1993); See also Lollar v. Alabama By-Products Corp., 893 F.2d 1258, 1262 (11th Cir. 1990).

As was previously discussed, Claimant has established that the Miner had pneumoconiosis pursuant to 20 C.F.R. § 718.202(a)(2) and that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. § 718.203(b). Consequently, the sole issue of contention in the survivor's claim is whether the Miner's death was due to pneumoconiosis.

a) Whether the Miner's Death Was Due to Pneumoconiosis

A miner's death will be considered due to pneumoconiosis if competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, where the death was caused by complications of pneumoconiosis, or where the presumption set forth at § 718.304 [complicated pneumoconiosis] is applicable. 20 C.F.R. § 718.205(c)(1)-(3); Trumbo v. Reading Anthracite Co., 17 BLR 1-85 (1993); Neeley v. Director, OWCP, 11 BLR 1-85 (1988); Boyd v. Director, OWCP, 11 BLR 1-39 (1988). Survivors are not eligible for benefits where the miner's death was caused by a traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death. 20 C.F.R. § 718.205(c)(4). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. § 18.205(c)(5).

Medical Evidence

Miner's Death Certificate (MDX-26). The Miner's death certificate, signed by Dr. James M. Adams, listed (a) respiratory failure and (b) pneumonia as immediate causes of death. Pulmonary anthracosis and cerebrovascular disease were listed as other significant conditions contributing to death. Dr. Adams also mentioned in his office notes that pulmonary anthracosis with chronic obstructive pulmonary disease was a contributing cause of the Miner's death. SDX-9.

Autopsy Report (MDX-26). The Miner's autopsy report, signed by Dr. James Newsome , reported that the Miner had a clinical history of chronic obstructive pulmonary disease with:

A. Pulmonary anthracosis, marked, consistent with a simple coal workers' pneumoconiosis, Type I (Type I, black lung disease).
B. Pulmonary emphysema, moderate.

[11] In Trumbo v. Reading Anthracite Co., 17 B.L.R. 1-85 (1993), the Board held that, in a Part 718 survivor's claim, the ALJ must make a threshold determination as to the existence of pneumoconiosis under 20 C.F.R. § 718.202(a) prior to considering whether the miner's death was due to the disease under § 718.205.

C. Pulmonary congestion and edema, moderate, and right lower lobe, marked.
D. Pulmonary hemorrhage and focal consolidation, lower lobe of right lung.
E. Fibrous pleural adhesions, moderate.

Dr. Newsome noted that slides of lung tissue showed small nodular areas of anthracosis with associated fibrosis, consistent with a simple pneumoconiosis. He listed complications of chronic obstructive pulmonary disease as the cause of death.

Report of Dr. Caffrey (SDX-9). Dr. Caffrey had the opportunity to review the autopsy slides and found that the Miner had a very mild degree of simple coal workers' pneumoconiosis. However, Dr. Caffrey opined that the Miner's "death definitely was not caused by pneumoconiosis and pneumoconiosis in [his] opinion was not a contributing factor and the very minimal simple CWP did not hasten his death." Rather, Dr. Caffrey was of the opinion that the Miner's death was due to cardiac problems. He explained that he did not agree with Dr. Adams' inclusion of pulmonary anthracosis as a contributing factor to the Miner's death because of the negative X-rays and because the autopsy slides show very minimal involvement by the lesions of simple coal workers' pneumoconiosis. Dr Caffrey reported that this minimal involvement would not have caused the patient pulmonary disability.

Report of Dr. Russakoff (SDX-10). Dr. Russakoff gave a consultative opinion based upon his review of the Miner's various medical records, including both the autopsy report and the autopsy slides. His opinion was that "there was no role of primary underlying lung disease that played any role in [the Miner's death], or any role in hastening his death." His rationale for this opinion was that the Miner's microscopic coal dust deposition was so minimal as to be clinically and functionally insignificant. Dr. Russakoff wrote, "The more likely cause of [the Miner's] death is a combination of his underlying cardiomyopathy, heart block representing rhythm disturbances, and finally a severe stroke that resulted in cardiac failure." He opined that none of these problems were in any way related to coal mine employment.

Report of Dr. Fino (SDX-11). Dr. Fino's consultative report concluded that "although simple coal workers' pneumoconiosis was present and emphysema was present…neither of these conditions played any role in his death." Dr. Fino stated that the Miner's respiratory failure had nothing to do with the inhalation of coal mine dust. Dr. Fino also opined that there was no clinical evidence of chronic obstructive pulmonary disease. That opinion was based upon the pulmonary function studies of 2002.

Discussion

The Miner's autopsy report listed complications of chronic obstructive pulmonary disease ("COPD") as the cause of death. The definition of legal pneumoconiosis includes any chronic obstructive pulmonary disease arising out of coal mine employment. 20 C.F.R. § 718.201(a)(2). The crucial issue in this claim is therefore whether or not the Miner's COPD was significantly related to, or substantially aggravated by, dust exposure in coal mine employment. See 20 C.F.R. § 718.201(b). The medical evidence clearly establishes the presence of, at the very minimum, a mild degree of simple coal workers' pneumoconiosis. Where the medical evidence

differs is whether the presence of the clinical pneumoconiosis (the coal dust depositions) complicated the COPD or was otherwise related to it.

It can be inferred from Dr. Newsome's autopsy report that he correlates the COPD with the clinical pneumoconiosis. On page one of the autopsy report, pulmonary anthracosis is listed as subsection (A.) directly under the diagnosis of COPD. Dr. Newsome also reports that "past medical history was significant for COPD with a history of pneumoconiosis." The autopsy report is supported by the death certificate filled out by Dr. Adams which lists pulmonary anthracosis as a significant condition contributing to death. Without contrary probative evidence, I would find that this evidence establishes that the Miner's death was hastened by COPD related to coal workers' pneumoconiosis.

I now turn to addressing the reports of Employer's physicians. First, I find that Dr. Fino's opinion does not warrant much probative weight. The reliability of Dr. Fino's report is significantly diminished because it does not discuss the pulmonary function study of February 14, 2003. Dr. Hawkins relied on that study when he first diagnosed the Miner with an obstructive lung impairment. Since COPD was listed as a cause of death on the autopsy, it was imperative that a well-reasoned opinion addressed and discussed Dr. Hawkins' finding of an obstructive defect. Dr. Fino failed to do so, and I therefore accord his opinion little probative weight.

The reliability of Dr. Russakoff's opinion is called into question because of its equivocal nature. Dr. Russakoff's stated: "It is not clear to me whether [the Miner] had an asthmatic lung condition or not." Id. If the Miner had an asthmatic lung condition that was related to coal dust exposure, it would fall under the regulatory definition of pneumoconiosis. Robinson v. Director, OWCP, 3 B.L.R. 1-798.7 (1981). As such, if it were established that it hastened the Miner's death, Claimant would be entitled to benefits. Because of Dr. Russakoff's uncertainty as to whether such a relevant and significant condition was present, I find that the reliability of his opinion is undermined.

Of the three Employer's consultative experts, Dr. Caffrey gives the most well-reasoned opinion. He reviewed all of the relevant medical evidence and his report was unequivocal. He disclosed that he disagreed with Dr. Adams' inclusion of pulmonary anthracosis as a contributing factor of death because of the minimal involvement of pneumoconiosis. His conclusion is that the Miner suffered a cardiac death. I accord significant weight to the doctor's well-reasoned opinion. Although Dr. Caffrey did not explain the etiology of the Miner's diagnosed COPD, he did question the Miner's smoking history. In addition, I find adequate support for the conclusion that the coal dust deposition in the Miner's lungs that was obvious on autopsy was insufficient to contribute to his death.

In consideration of the physician opinion evidence, I find that it fails to establish that the Miner's death was due to pneumoconiosis. I find that the evidence considered as a whole leads to the same finding.

III. CONCLUSION

Based upon my review of all of the evidence, I find that Claimant has established that the Miner suffered from pneumoconiosis arising out of coal mine employment and that he was totally disabled. However, Claimant has not established that the Miner's total disability was due to pneumoconiosis, and the living miner's claim is denied.

I further find that Claimant failed to establish that the Miner's death was due to pneumoconiosis.

IV. ATTORNEY'S FEE

The award of an attorney's fee is permitted only in cases in which Claimant is found to be entitled to benefits under the Act. Since benefits are not awarded in this claim, the Act prohibits the charging of any fee to Claimant for representation services rendered in pursuit of the claim.

ORDER

The claim of BOBBIE N. HARRISON, on behalf of COY D. HARRISON, for benefits under the Act is hereby DENIED.

The claim of BOBBIE N. HARRISON for benefits as surviving spouse is DENIED.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).